

No. PD-0183-21

In the Court of Criminal Appeals of Texas

—————◆—————
No. 14-20-00548-CR
In the Court of Appeals for the
Fourteenth District of Texas at Houston

FILED
COURT OF CRIMINAL APPEALS
5/20/2021
DEANA WILLIAMSON, CLERK

—————◆—————
No. 2309523
In the County Criminal Court at Law No. 8 of Harris County, Texas

—————◆—————
THE STATE OF TEXAS
Appellant

V.

LEONARDO FABIO GARCIA
Appellee

—————◆—————
STATE'S BRIEF ON DISCRETIONARY REVIEW
—————◆—————

KIM OGG
District Attorney
Harris County, Texas

MELISSA HERVEY STRYKER
Assistant District Attorney
Harris County, Texas

DARIENNE NICHOLAS
FARNAZ HUTCHINS
Assistant District Attorneys
Harris County, Texas

500 Jefferson Street, Suite 600
Houston, Texas 77002
Telephone: (713) 274-5826
Fax Number: (832) 927-0180
Stryker_Melissa@dao.hctx.net
State Bar Number: 24053741

ORAL ARGUMENT NOT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

Upon granting the State's petition for discretionary review, this Court determined that it will not permit oral argument in this case.

IDENTITY OF THE JUDGE, PARTIES, AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), a complete list of the names and addresses of all attorneys, and the names of all interested persons, is provided below so that the members of this Honorable Court may at once determine whether they are disqualified to serve or whether they should recuse themselves from participating in the decision of the case.

Counsel for the State/Appellant:

Kim Ogg—District Attorney of Harris County, Texas

Melissa Hervey Stryker—Assistant District Attorney on appeal

Darienne Nicholas; Farnaz Hutchins—Assistant District Attorneys for habeas corpus proceeding

Harris County District Attorney's Office
500 Jefferson Street, Suite 600
Houston, Texas 77002

Stacey M. Soule—State Prosecuting Attorney

P.O. Box 13046
Austin, Texas 78711

Appellee:

Leonardo Fabio Garcia

Counsel for Appellee:

Elaine Veatch Morley—Counsel on appeal and for habeas corpus proceeding

2245 Texas Drive, Suite 300
Sugarland, Texas 77479

Juan J. Aguirre—Counsel for underlying criminal case

1919 North Loop West, Suite 310
Houston, Texas 77008

Trial Judges:

The Honorable Franklin Bynum—Presiding Judge of the County Criminal Court at Law Number 8 of Harris County, Texas, for Appellee’s habeas corpus proceeding

The Honorable Jay Karahan—Presiding Judge of the County Criminal Court at Law Number 8 of Harris County, Texas, for Appellee’s underlying criminal case

TABLE OF CONTENTS

| | |
|--|----|
| STATEMENT REGARDING ORAL ARGUMENT | 2 |
| IDENTITY OF THE JUDGE, PARTIES, AND COUNSEL..... | 2 |
| TABLE OF CONTENTS..... | 3 |
| INDEX OF AUTHORITIES..... | 5 |
| STATEMENT OF THE CASE..... | 8 |
| STATEMENT OF PROCEDURAL HISTORY..... | 10 |

| | |
|--|----|
| GROUND FOR REVIEW | 11 |
| STATEMENT OF FACTS | 12 |
| SUMMARY OF THE ARGUMENT | 15 |
| ARGUMENT FOR THE STATE’S SOLE GROUND FOR REVIEW..... | 15 |
| I. The State is permitted to appeal a trial court’s habeas corpus order when Article 44.01 specifically authorizes the appeal, or when the order results in a situation in which the State could otherwise appeal, per Article 44.01(a) | 16 |
| II. The Legislature’s addition of Subsection (k) to Article 44.01 does not diminish the State’s right of appeal under Subsection (a) of Article 44.01 | 19 |
| III. The Thirteenth Court of Appeals has held that the State may appeal an order granting relief in an Article 11.09 habeas corpus proceeding | 22 |
| IV. The Fourteenth Court of Appeals’ opinion conflicts with the Thirteenth Court of Appeals’ opinion and misconstrues the “discharge” language of the trial court’s order to mean “dismissal,” when the only appropriate relief was to remand for a new trial..... | 24 |
| V. Even if the trial court’s order “discharging” Appellee actually dismissed the information, it would still be an appealable order under Article 44.01(a)(1)..... | 28 |
| CONCLUSION AND PRAYER | 29 |
| CERTIFICATE OF COMPLIANCE..... | 32 |
| CERTIFICATE OF SERVICE | 33 |

INDEX OF AUTHORITIES

CASES

| | |
|--|------------|
| <i>Alvarez v. Eighth Court of Appeals of Texas</i> , 977 S.W.2d 590 (Tex. Crim. App. 1998)..... | 17, 28, 29 |
| <i>Ex parte Briggs</i> , 187 S.W.3d 458 (Tex. Crim. App. 2005)..... | 26 |
| <i>Ex parte Bryant</i> , 448 S.W.3d 29 (Tex. Crim. App. 2014)..... | 26 |
| <i>Ex parte Crenshaw</i> , 25 S.W.3d 761 (Tex. App.— Houston [1st Dist.] 2000, pet. ref'd) | 18 |
| <i>Ex parte Moody</i> , 991 S.W.2d 856 (Tex. Crim. App. 1999)..... | 26 |
| <i>Ex parte Overton</i> , 444 S.W.3d 632 (Tex. Crim. App. 2014)..... | 26 |
| <i>Ex parte Wilson</i> , 724 S.W.2d 72 (Tex. Crim. App. 1987)..... | 27 |
| <i>In re The State of Texas</i> , No. 08-09-00181-CR, 2010 WL 335630 (Tex. App.— El Paso Jan. 29, 2010, no pet.) | 24, 25 |
| <i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010) | 14 |
| <i>State ex rel. Holmes v. Klevenhagen</i> , 819 S.W.2d 539 (Tex. Crim. App. 1991)..... | 17 |
| <i>State v. Boyd</i> , 202 S.W.3d 393 (Tex. App.— Dallas 2006, pet. ref'd)..... | 18 |
| <i>State v. Chen</i> , 615 S.W.3d 376 (Tex. App.— Houston [14th Dist.] 2020, no pet.)..... | 18, 28, 29 |
| <i>State v. Evans</i> , 843 S.W.2d 576 (Tex. Crim. App. 1992)..... | 27 |

| | |
|--|--------------------|
| <i>State v. Garcia</i> , 619 S.W.3d 380 (Tex. App.— Houston [14th Dist.] 2021, pet. granted)..... | 10, 11, 19, 24 |
| <i>State v. Garcia</i> , No. 13-11-00689-CR, 2012 WL 7849303 (Tex. App.— Corpus Christi-Edinburg Dec. 13, 2012, no pet.) | 18, 22, 23, 24, 28 |
| <i>State v. Kanapa</i> , 778 S.W.2d 592 (Tex. App.— Houston [1st Dist.] 1989, no pet.) | 18 |
| <i>State v. Savage</i> , 933 S.W.2d 497 (Tex. Crim. App. 1996)..... | 27 |
| <i>State v. Young</i> , 810 S.W.2d 221 (Tex. Crim. App. 1991)..... | 17, 29 |

STATUTES

| | |
|--|--------|
| 8 U.S.C. § 1227(a)(2)(A)(ii) | 13 |
| TEX. CODE CRIM. PROC. ANN. art. 11.01..... | 25 |
| TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b)(2) | 21 |
| TEX. CODE CRIM. PROC. ANN. art. 11.09..... | 9, 14 |
| TEX. CODE CRIM. PROC. ANN. art. 11.22..... | 25 |
| TEX. CODE CRIM. PROC. ANN. art. 11.40..... | 25 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01..... | 16 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon’s 2002)..... | 16 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon’s 2003)..... | 16 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01(a) | 21 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(1) | 28, 29 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3) | 28 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01(b) | 21 |
| TEX. CODE CRIM. PROC. ANN. art. 44.01(k)..... | 16 |
| TEX. GOV’T CODE ANN. § 311.031(a)(1)..... | 20 |

| | |
|--|-------|
| TEX. PENAL CODE ANN. § 31.03(e)(2)(A)(ii)..... | 8, 12 |
| TEX. PENAL CODE ANN. § 31.06 | 8, 12 |

OTHER AUTHORITIES

| | |
|--|--------|
| ACT OF JUNE 20, 2003, 78TH LEG., R.S., CH. 587, 2003 TEX. SESS. LAW SERV. CH. 587 (H.B. 1713) | 16, 19 |
| HOUSE COMM. CRIM. JURIS., BILL ANALYSIS, TEX. H.B. 1713, 78TH LEG., R.S. (2003) | 20 |

RULES

| | |
|----------------------------|----|
| TEX. R. APP. P. 68.2 | 11 |
|----------------------------|----|

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

In trial court cause number 1413575, the State charged Appellee by information with the Class B misdemeanor offense of theft by check of property valued at \$20 or more but less than \$500, committed on or about November 11, 2004. (CR – 35);¹ *see* TEX. PENAL CODE ANN. § 31.03(e)(2)(A)(ii) (Vernon 2004); *see also* TEX. PENAL CODE ANN. § 31.06 (Vernon 2004). On May 15, 2007, pursuant to a plea bargain agreement between the State and Appellee, Appellee pled guilty to the offense, as charged, and the State recommended that the trial court sentence Appellee to confinement in the Harris County Jail for 10 days, with credit for the 3 days that Appellee had already served in jail. (CR – 35). On May 15, 2007, the trial court: accepted the parties' plea agreement; accepted Appellee's guilty plea; found Appellee guilty, as charged; found that Appellee entered his plea freely and voluntarily, and that Appellee was aware of the consequences of his plea; and sentenced Appellee to confinement in the Harris County Jail for 10 days, with credit for 3 days of jail time previously served. (CR – 35-36). Appellee did not appeal this conviction.

¹ The clerk's record consists of one volume, which will be referenced as (CR – [page number]). The court reporter's record consists of one volume from the hearing on Appellee's habeas corpus application, held on June 26, 2020, which will be referenced as (RR – [page number]). The State's Exhibit admitted at the hearing will be cited as (SX 1).

On May 1, 2020, in trial court cause number 2309523, pursuant to Article 11.09 of the Texas Code of Criminal Procedure, Appellee filed in the trial court an application for a writ of habeas corpus seeking to collaterally attack Appellee's conviction in cause number 1413575 on the grounds that Appellee's guilty plea was involuntary due to ineffective assistance of counsel.² (CR – 5-8); *see generally* TEX. CODE CRIM. PROC. ANN. art. 11.09. The State filed an answer to Appellee's habeas corpus application on June 13, 2020. (CR – 21-37). Appellee filed a response to the State's answer on June 16, 2020, and requested a hearing. (CR – 38-46). On June 18, 2020, the trial court set the case for a hearing on June 26, 2020. (CR – 47). On June 26, 2020, trial court held the hearing, during which Appellee testified and the State proffered the affidavit of Juan Aguirre, Appellee's counsel for the plea proceedings in cause number 1413575. *See generally* (RR 3-39). On July 14, 2020, the trial court granted Appellee's request for habeas corpus relief, ordered that the trial court's prior judgment of conviction and sentence in cause number 1413575 be vacated, and also ordered that Appellee be "discharged

² Appellee's application for a writ of habeas corpus also collaterally attacked another of Appellee's prior convictions for misdemeanor theft, for which a different trial court entered an order placing Appellee on deferred adjudication community supervision on November 19, 1998. *See* (CR – 5-8); *see also* (CR – 45) (showing that the County Criminal Court at Law Number 9 of Harris County, Texas, entered Appellee's 1998 order of deferred adjudication community supervision). The trial court's ruling and order regarding Appellee's habeas corpus application does not address or grant relief from Appellee's 1998 conviction, however, given that that conviction occurred in a different trial court. *See* (CR – 48) (granting habeas corpus relief only as to the trial court's judgment in cause number 1413575, entered May 15, 2007).

and released without delay.” (CR – 48). On July 30, 2020, the State timely filed written notice of appeal to challenge the trial court’s ruling granting habeas corpus relief. (CR – 54-56).

On March 2, 2021, the Fourteenth Court of Appeals of Houston issued a published opinion concluding that the State had no right to appeal the trial court’s order granting relief on Appellee’s Article 11.09 habeas corpus application because: (1) Article 44.01 of the Texas Code of Criminal Procedure does not explicitly authorize the State to appeal such an order; and (2) the trial court’s order vacated the court’s 2007 judgment and “discharged” Appellee, rather than granting a new trial, or modifying or arresting the court’s judgment, and thus the order does not otherwise qualify as an appealable order under Article 44.01(a). *See State v. Garcia*, 619 S.W.3d 380, 382-85 (Tex. App.—Houston [14th Dist.] 2021, pet. granted). Accordingly, the Fourteenth Court of Appeals dismissed the State’s appeal for want of jurisdiction. *Garcia*, 619 S.W.3d at 385.

◆

STATEMENT OF PROCEDURAL HISTORY

On March 2, 2021, the Fourteenth Court of Appeals issued a published opinion concluding that the State had no right to appeal the trial court’s order granting relief on Appellee’s Article 11.09 habeas corpus application because: (1) Article 44.01 of the Texas Code of Criminal Procedure does not explicitly

authorize the State to appeal such an order; and (2) the trial court's order vacated the court's 2007 judgment and "discharged" Appellee, rather than granting a new trial, or modifying or arresting the court's judgment, and thus the order does not otherwise qualify as an appealable order under Article 44.01(a). *See Garcia*, 619 S.W.3d at 382-85. Accordingly, the Fourteenth Court of Appeals dismissed the State's appeal for want of jurisdiction. *Id.* at 385.

The State did not file a motion for rehearing or a motion for *en banc* reconsideration by the Fourteenth Court of Appeals. Rather, in accordance with Texas Rule of Appellate Procedure 68.2(a), the State timely filed a petition for discretionary review with this Court on March 15, 2021. *See TEX. R. APP. P.* 68.2(a). This Court granted the State's petition for discretionary review on April 21, 2021.

◆

GROUND FOR REVIEW

The Fourteenth Court of Appeals misconstrued Article 44.01 of the Texas Code of Criminal Procedure and erred in concluding that the State does not have the right to appeal the trial court's order granting relief in a habeas corpus proceeding brought under Article 11.09 of the Texas Code of Criminal Procedure, when the trial court's order functionally served to either grant a new trial or to

dismiss the information—both of which would constitute an appealable order under Article 44.01(a).

◆

STATEMENT OF FACTS

Appellee, a native and citizen of Honduras, was born in Honduras on June 6, 1991. (RR – 10); *see* (CR – 45). Appellee immigrated to the United States with his family when he was approximately 3 years old, and his immigration status was adjusted to that of a lawful permanent resident (LPR) on December 6, 1995. *See* (CR – 45).

On November 11, 2004, while still an LPR, Appellee was arrested and charged with the Class B misdemeanor offense of theft by check of property valued at \$20 or more but less than \$500. (CR – 35); *see* TEX. PENAL CODE ANN. § 31.03(e)(2)(A)(ii) (Vernon 2004); *see also* TEX. PENAL CODE ANN. § 31.06 (Vernon 2004). The case was filed in County Criminal Court at Law Number 8 of Harris County, Texas, under cause number 1413575. *See* (CR – 35). On May 15, 2007, criminal defense attorney Juan Aguirre was serving as “attorney of the week” in County Criminal Court at Law Number 8 and was appointed to represent Appellee in cause number 1413575. *See* (SX 1). On May 15, 2007, Appellee and the State reached a plea bargain agreement whereby Appellee agreed to plead guilty to the offense, as charged, and the State agreed to recommend to the trial

court that the court sentence Appellee to confinement in the Harris County Jail for 10 days, with credit for the 3 days that Appellee had already served in jail. (CR – 35); *see* (SX 1). On May 15, 2007, the trial court: accepted the parties’ plea agreement; accepted Appellee’s guilty plea; found Appellee guilty, as charged; found that Appellee pled guilty freely and voluntarily, and that Appellee was aware of the consequences of his plea; and sentenced Appellee to confinement in the Harris County Jail for 10 days, with credit for the 3 days that Appellee previously served in jail. (CR – 35-36, 45). Appellee did not appeal this conviction.

On November 26, 2019, the United States Department of Homeland Security served Appellee with a “Notice to Appear” for removal proceedings, asserting that Appellee is removable from the United States because, pursuant to Section 237(a)(2)(A)(ii) of the United States Immigration and Nationality Act, after being admitted to the United States, Appellee “ha[s] been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.”³ (CR – 44-46); *see* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that “[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,...is deportable.”).

³ The Notice to Appear cited Appellee’s 1998 order of deferred adjudication for misdemeanor theft and Appellee’s 2007 conviction for misdemeanor theft—the conviction at issue in this appeal—as Appellee’s two removable offenses. *See* (CR – 45).

On May 1, 2020, nearly 13 years after Appellee’s conviction in cause number 1413575 became final, Appellee filed in the trial court an application for a writ of habeas corpus pursuant to Article 11.09 of the Texas Code of Criminal Procedure, seeking to collaterally attack Appellee’s conviction in cause number 1413575. (CR – 5-8); *see generally* TEX. CODE CRIM. PROC. ANN. art. 11.09 (pertaining to applications for writs of habeas corpus seeking relief in misdemeanor cases). Specifically, Appellee alleged that his guilty plea in cause number 1413575 was involuntary due to ineffective assistance of counsel because his defense attorney “failed to advise [Appellee] of the severe immigration consequences before he entered a plea of guilty[,]” in violation of *Padilla v. Kentucky*, 559 U.S. 356 (2010). (CR – 5-8).

On June 26, 2020, trial court held the hearing concerning the merits of Appellee’s habeas corpus application and then took the matter under advisement. *See* (RR – 30-32). On July 14, 2020, the trial court issued an order granting Appellee’s request for habeas corpus relief, vacating the trial court’s prior judgment of conviction and sentence in cause number 1413575, and ordering that Appellee be “discharged and released without delay.” (CR – 48). The trial court did not enter any findings of fact or conclusions of law regarding the basis for the court’s ruling. *See generally* (CR – 68).

SUMMARY OF THE ARGUMENT

The Fourteenth Court of Appeals erroneously dismissed the State's appeal for want of jurisdiction upon concluding that the State had no right to appeal the trial court's order granting Appellee's request for habeas corpus relief pursuant to Article 11.09 of the Texas Code of Criminal Procedure. In doing so, the Fourteenth Court of Appeals misconstrued Article 44.01 and incorrectly held that Subsection (k) of that provision operates as a restriction of the State's right of appeal under other portions of Article 44.01. Further, the Fourteenth Court of Appeals erred in deeming the trial court's order to be a dismissal of the information, rather than the functional equivalent of a grant of a new trial, despite the verbiage that the trial court used in the order. Lastly, even if the trial court's order did serve to dismiss the information, the Fourteenth Court of Appeals erred in finding that the State still lacked the right of appeal because Article 44.01(a) permits the State to appeal trial courts' orders which dismiss all or any part of a charging instrument.

ARGUMENT FOR THE STATE'S SOLE GROUND FOR REVIEW

The Fourteenth Court of Appeals misconstrued Article 44.01 of the Texas Code of Criminal Procedure and erred in concluding that the State does not have the right to appeal the trial court's order granting relief in a habeas corpus proceeding brought under Article 11.09 of the Texas Code of Criminal Procedure when the trial court's order functionally served to either grant a

new trial or to dismiss the information—both of which would constitute an appealable order under Article 44.01(a).

- I. The State is permitted to appeal a trial court’s habeas corpus order when Article 44.01 specifically authorizes the appeal, or when the order results in a situation in which the State could otherwise appeal, per Article 44.01(a)

Article 44.01 of the Texas Code of Criminal Procedure provides the circumstances under which the State may appeal in a criminal case. *See generally* TEX. CODE CRIM. PROC. ANN. art. 44.01 (“Appeal by State”). Article 44.01(k) specifically entitles the State “to appeal an order granting relief to an applicant for a writ of habeas corpus under Article 11.072[,]” but neither Subsection (k) nor any other provision in Article 44.01 explicitly provides the State the right to appeal an order granting relief to a habeas corpus applicant in proceedings brought under Article 11.09 of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(k); *see generally* TEX. CODE CRIM. PROC. ANN. art. 44.01.

However, the fact that Article 44.01 does not explicitly list Article 11.09 does not preclude the State from appealing a trial court’s Article 11.09 order because, even before Article 44.01 mentioned any habeas corpus order at all,⁴ this

⁴ Prior to 2003, when the Texas Legislature added both Article 11.072 (creating habeas corpus proceedings from cases involving community supervision) and Subsection (k) to Article 44.01 (permitting State’s appeals from habeas corpus orders in Article 11.072 cases), Article 44.01 made no mention of habeas corpus proceedings or State’s appeals therefrom. *Compare* TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon’s 2002) *with* TEX. CODE CRIM. PROC. ANN. art. 44.01 (Vernon’s 2003); *see* ACT OF JUNE 20, 2003, 78TH LEG., R.S., CH. 587, 2003 TEX. SESS. LAW SERV. CH. 587 (H.B. 1713) (adding Article 11.072 and Article 44.01(k) to the Texas Code of Criminal Procedure).

Court made clear that the State may appeal a trial court’s order granting habeas corpus relief when the order functionally creates one of the appealable scenarios that Article 44.01 does specifically enumerate. *See Alvarez v. Eighth Court of Appeals of Texas*, 977 S.W.2d 590, 593 (Tex. Crim. App. 1998) (“We hold that if the granting of relief by a habeas corpus court results in one of the enumerated situations within Art. 44.01(a), the State may appeal regardless of what label is used to denominate the proceeding which results in the order being entered.”); *State v. Young*, 810 S.W.2d 221, 222-23 (Tex. Crim. App. 1991) (finding the appellate court had jurisdiction and holding that the State could appeal an order granting habeas corpus relief which had the effect of dismissing the indictments pending against the appellees because, per Article 44.01(a)(1), the State is entitled to appeal order which dismisses an indictment); *contra State ex rel. Holmes v. Klevenhagen*, 819 S.W.2d 539 (Tex. Crim. App. 1991) (holding that the State could not appeal an order granting habeas corpus relief and barring extradition to Louisiana because Article 44.01 does not authorize the State to appeal an order related to extradition).

Following this Court’s lead, other Texas courts of appeals have determined that the State is permitted to appeal an order granting habeas corpus relief when the order is functionally equivalent to an order that is otherwise appealable under Article 44.01(a). *See State v. Chen*, 615 S.W.3d 376, 379 n.1 (Tex. App.—

Houston [14th Dist.] 2020, no pet.) (explaining that the State could appeal an order granting Article 11.09 habeas corpus relief which quashed an information because the order dismissed the charging instrument and, so, was appealable under Article 44.01(a)(1)); *State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303, at *3-4 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not designated for publication) (finding the appellate court had jurisdiction and holding that the State could appeal an order granting habeas corpus relief under Article 11.09 because the order was tantamount to an order granting a new trial, which the State may normally appeal under Article 44.01(a)(3)); *Ex parte Crenshaw*, 25 S.W.3d 761, 764 n.4 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (observing that the State may appeal an order granting habeas corpus relief when the order is equivalent to an order that sustains a claim of former jeopardy, given that the State may normally appeal such an order under Article 44.01(a)(4)); *State v. Kanapa*, 778 S.W.2d 592, 593-94 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (finding that the appellate court had jurisdiction and holding that the State could appeal an order granting habeas corpus relief and modifying the previous judgment entered against the appellee in a misdemeanor DWI case, given that Article 44.01(a)(2) allows the State to appeal an order modifying a judgment); *cf. State v. Boyd*, 202 S.W.3d 393, 399-401 (Tex. App.—Dallas 2006, pet. ref'd) (concluding that the State could appeal an order granting a mistrial when the order was functionally

indistinguishable from an order granting a new trial, which is appealable under Article 44.01(a)(3)).

II. The Legislature's addition of Subsection (k) to Article 44.01 does not diminish the State's right of appeal under Subsection (a) of Article 44.01

In 2003, the Texas Legislature passed a bill which simultaneously created Article 11.072 (to allow habeas corpus proceedings in community supervision cases) and added Subsection (k) to Article 44.01 (to allow the State to appeal orders granting habeas corpus relief in proceedings brought under Article 11.072). *See* ACT OF JUNE 20, 2003, 78TH LEG., R.S., CH. 587, 2003 TEX. SESS. LAW SERV. CH. 587 (H.B. 1713) (adding Article 11.072 and Article 44.01(k) to the Texas Code of Criminal Procedure). In Appellee's case, the Fourteenth Court of Appeals reasoned that the Legislature added Subsection (k) to specifically "single out grants of 11.072 habeas-corpus relief when granting the State the right to appeal[.]" and surmised that the Legislature's failure to also add Article 11.09 to Article 44.01's list of appealable orders must mean that the Legislature intended to deprive the State the right to appeal trial courts' orders granting habeas corpus relief in Article 11.09 proceedings. *See Garcia*, 619 S.W.3d at 384. The appellate court's assessment places undue emphasis on the Legislature's addition of Subsection (k), though, because nothing in the bill creating that provision evinces any intent by the Legislature to restrict the State's right of appeal under other, pre-existing portions of Article 44.01, such as Subsection (a). *See* HOUSE COMM. CRIM. JURIS., BILL

ANALYSIS, TEX. H.B. 1713, 78TH LEG., R.S. (2003) (explaining that “[this bill] also would amend Code of Criminal Procedure, art. 44.01, to clarify that the state is entitled to appeal an order granting relief to an applicant for a writ of habeas corpus under art. 11.072[.]” but not stating that the addition of Subsection (k) was intended to restrict the applicability of any other subsection of Article 44.01).

Rather, given its self-contained nature, it appears that the Legislature intended only that the bill clarify that, in addition to orders that were already appealable under other portions of Article 44.01, the State has the right to appeal orders granting Article 11.072 habeas corpus relief, as well. *See* HOUSE COMM. CRIM. JURIS., BILL ANALYSIS, TEX. H.B. 1713, 78TH LEG., R.S. (2003) (creating Article 11.072 and Subsection (k) of Article 44.01, but listing no provision or statement to the effect that Subsection (k) provides the only right of appeal in habeas corpus proceedings, generally); *see also* TEX. GOV’T CODE ANN. § 311.031(a)(1) (establishing that “the reenactment, revision, amendment, or repeal of a statute does not affect...the prior operation of the statute or any prior action taken under it[.]”). Hence, the Fourteenth Court of Appeals erred in interpreting the addition of Subsection (k) as either an explicit or implicit expression of legislative intent that that provision operate to restrict the application of other portions of Article 44.01.

Further diminishing the Fourteenth Court of Appeals’ reasoning that Subsection (k) was intended to simultaneously “single out grants of [Article] 11.072 habeas-corpus relief” as the only appealable habeas-corpus orders while barring appeals of orders granting relief in other, non-Article-11.072 scenarios is the fact that the Legislature’s addition of Subsection (k) was essential to permit the State to appeal in specific circumstances that are unique to Article 11.072 habeas corpus proceedings and could not be encompassed in the pre-existing provisions of Article 44.01—namely, when an Article 11.072 order grants relief only regarding the terms or conditions of the habeas-corpus applicant’s community supervision, but does not dismiss, modify, or otherwise impact the judgment imposing community supervision, itself. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b)(2) (permitting an applicant seeking habeas corpus relief to challenge the legal validity of “the conditions of community supervision” which allegedly restrain the applicant, independently of a challenge to a judgment of conviction or order imposing community supervision); *see also* TEX. CODE CRIM. PROC. ANN. art. 44.01(a) (authorizing State’s appeals only when the trial court’s order dismisses the charging instrument, arrests or modifies a judgment, grants a new trial, sustains a double jeopardy claim, suppresses evidence, etc.); TEX. CODE CRIM. PROC. ANN. art. 44.01(b) (permitting the State to appeal an order that imposes an illegal sentence).

So, while the Legislature’s addition of Subsection (k) created some redundancy with Subsection (a)—which would already have permitted the State to appeal an order granting Article 11.072 relief which vacated a judgment and remanded the case for a new trial, dismissed the charging instrument, sustained a claim of double jeopardy, etc.—Subsection (k) also expanded the State’s right of appeal in the specific circumstances envisioned by Article 11.072 where a habeas-corpus applicant attains an order of relief related to the conditions of his community supervision, only, which became a possible remedy only with the Legislature’s advent of Article 11.072 in the same bill. Again, though, absent some indication that the Legislature intended Subsection (k) to act as an explicit or implicit constriction on other portions of Article 44.01, or Article 44.01(a), specifically, the logical interpretation of the Legislature’s conduct is that Subsection (k) operates only to increase the State’s ability to appeal, not to reduce it or supplant the long-standing operation of Article 44.01(a). The Fourteenth Court of Appeals erred in concluding otherwise.

III. The Thirteenth Court of Appeals has held that the State may appeal an order granting relief in an Article 11.09 habeas corpus proceeding

In *State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not designated for publication), the Thirteenth Court of Appeals of Corpus Christi-Edinburg addressed the State’s right to appeal an order granting relief in an Article 11.09

habeas corpus proceeding in a very similar scenario as occurred in Appellee's case. *See Garcia*, 2012 WL 7849303, at *3-4. In *Garcia*, the trial court granted the appellee's Article 11.09 application for a writ of habeas corpus which alleged that the appellee's guilty plea to the Class B misdemeanor offense of possession of marijuana was unknowingly and involuntarily entered because the appellee purportedly did not understand the immigration consequences of his plea. *Garcia*, 2012 WL 7849303, at *1. The State appealed the trial court's order granting Article 11.09 habeas corpus relief and, as a threshold matter, the Thirteenth Court of Appeals addressed whether the appellate court had jurisdiction over the appeal, given that Article 44.01 does not explicitly authorize the State to appeal an order granting relief on an application for a writ of habeas corpus brought under Article 11.09. *Garcia*, 2012 WL 7849303, at *3.

The Thirteenth Court of Appeals determined that, despite that Article 44.01 does not specifically permit the State to appeal an order granting Article 11.09 habeas corpus relief, and despite the language used in the trial court's order, the trial court's order granting habeas corpus relief was tantamount to an order granting a new trial, which the State is explicitly permitted to appeal under Article 44.01(a)(3); thus, the appellate court concluded that it had jurisdiction over the appeal:

In other words, the habeas court's order in this case had the effect of setting aside the guilty verdict and ordering a rehearing in *Garcia's*

marihuana possession case. Because this ruling is the functional equivalent of an order granting a new trial, the State is permitted to appeal this ruling, no matter the label used in the trial court's order. We therefore conclude that we have jurisdiction over the State's appeal in this case.

Garcia, 2012 WL 7849303, at *3-4.

IV. The Fourteenth Court of Appeals' opinion conflicts with the Thirteenth Court of Appeals' opinion and misconstrues the "discharge" language of the trial court's order to mean "dismissal," when the only appropriate relief was to remand for a new trial

In its opinion, the Fourteenth Court of Appeals did not disagree with the Thirteenth Court of Appeals' reasoning or conclusion in *Garcia* that the State could appeal the court's order granting relief in an Article 11.09 habeas corpus proceeding in that case. *See Garcia*, 619 S.W.3d at 383-84. However, the Fourteenth Court of Appeals declined to follow *Garcia* because the appellate court found that, unlike in *Garcia*, the trial court's order in Appellee's case did not grant a new trial, but rather "vacated the conviction and *discharged* [A]ppellee." *Id.* (emphasis added).⁵ The appellate court's assessment of the language and effect of

⁵ Adding to the circuit split, prior to the Thirteenth Court of Appeals' 2012 opinion in *Garcia*, the Eighth Court of Appeals of El Paso found in a mandamus proceeding that "Texas Code of Criminal Procedure 44.01 does not authorize a State's appeal from a writ of habeas corpus" in a case involving an Article 11.09 habeas corpus proceeding. *See In re The State of Texas*, No. 08-09-00181-CR, 2010 WL 335630, at *1 (Tex. App.—El Paso Jan. 29, 2010, no pet.) (not designated for publication). Notably, though, in reaching this conclusion, the Eighth Court of Appeals did not consider this Court's jurisprudence in *Alvarez* or *Young*, or any of the opinions of the other intermediate appellate courts which followed this Court's guidance and held that the State may appeal a trial court's habeas corpus order which has the effect of one of the situations enumerated in Article 44.01, regardless of the terminology employed in the order. *See In re*

the trial court's order is erroneous, though, because, in the context of habeas corpus proceedings, the term "discharge" does not mean "dismissal."

The writ of habeas corpus is a remedy to be used by a person restrained in his liberty to test the legality of his custody or restraint. *See* TEX. CODE CRIM. PROC. ANN. art. 11.01. A person is "restrained," for purposes of habeas corpus, if the person is actually confined or is subject to the general authority and power of a person claiming the right to exercise control over the person. *See* TEX. CODE CRIM. PROC. ANN. art. 11.22. Article 11.40 of the Code of Criminal Procedure provides that, if the court considering a person's application for a writ of habeas corpus determines that there is no legal cause for the person's imprisonment or restraint, or that a legal cause once existed but no longer exists, the court shall order that the person "be discharged." *See* TEX. CODE CRIM. PROC. ANN. art. 11.40. Notably, though, "discharge" in this sense means that the habeas corpus applicant is discharged from the circumstances of his restraint or imprisonment; it does not mean, as the Fourteenth Court of Appeals surmises in its opinion, that the proceedings and charging instrument against the applicant are entirely dismissed and he no longer has to answer to them.

State, 2010 WL 335630, at *1 (concluding that the State may not appeal a trial court's habeas corpus order at all, without reference to *Alvarez* or *Young*).

Specifically, in the context of claims of ineffective assistance of counsel raised through the habeas corpus process, as occurred in this case, this Court has long-established precedent that the appropriate relief upon sustaining the habeas corpus applicant's claim is to vacate the judgment that imposes the restraint or confinement and remand the case to the trial court for a new trial—i.e., to return the parties to their original positions before the deficient representation. *See, e.g., Ex parte Overton*, 444 S.W.3d 632, 641 (Tex. Crim. App. 2014) (granting habeas corpus relief on the grounds of ineffective assistance of counsel and ordering, as a remedy, that the applicant's conviction be reversed and the case be “remanded...to the trial court for a new trial.”); *Ex parte Bryant*, 448 S.W.3d 29, 45 (Tex. Crim. App. 2014) (granting habeas corpus relief on the grounds of ineffective assistance of counsel, finding that the applicant was “entitled to a new trial[,]” and ordering that the applicant be remanded to the custody of the county sheriff); *Ex parte Briggs*, 187 S.W.3d 458, 470 (Tex. Crim. App. 2005) (granting habeas corpus relief and ordering, as a remedy, that the complained-of judgment be vacated and the applicant be “remanded to the custody of the Sheriff of Harris County to answer to the indictment”—i.e., that the applicant receive a new trial on the indictment); *Ex parte Moody*, 991 S.W.2d 856, 859 (Tex. Crim. App. 1999) (granting habeas corpus relief on the grounds of ineffective assistance of counsel in a plea setting and, as relief, setting aside the trial court's judgment and remanding

the case for the applicant “to answer the charges against him.”); *Ex parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987) (granting habeas corpus relief upon sustaining a claim of ineffective assistance of counsel in a plea setting and, as relief, vacating the judgment of conviction and remanding the case for a new trial). In light of this jurisprudence, the Fourteenth Court of Appeals erred in deeming the trial court’s order “discharging” Appellee to be a dismissal of the proceedings and information against Appellee, rather than an order vacating the judgment that served to “restrain” Appellee and granting a new trial.

Relatedly, the Fourteenth Court of Appeals also misconstrued the effect of the trial court’s order, ignoring this Court’s precedent that establishes that “when an order is the functional equivalent of granting a motion for new trial, the reviewing court can look past the label assigned to the order by the trial court and treat the order as a motion for new trial.” *See State v. Savage*, 933 S.W.2d 497, 499 (Tex. Crim. App. 1996); *State v. Evans*, 843 S.W.2d 576, 577 (Tex. Crim. App. 1992). Here, it is clear that, by vacating Appellee’s guilty plea and the court’s judgment of conviction and sentence, the trial court’s order merely released Appellee from the restraint of his conviction and put the parties back in the positions they held before Appellee pled guilty and was convicted by the trial court. As such, like in the Thirteenth Court of Appeals’ opinion in *Garcia*, the trial court’s order was the functional equivalent to an order granting a new trial,

regardless of the “discharge” phrasing of the order, and the State was authorized to pursue a State’s appeal of the order under Article 44.01(a)(3). *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3) (explicitly permitting the State to appeal an order granting a new trial); *Garcia*, 2012 WL 7849303, at *3-4 (holding that the appellate court had jurisdiction over the State’s appeal of an Article 11.09 order because the order was the functional equivalent to an order granting a new trial); *see Alvarez*, 977 S.W.2d at 593 (holding that, when a trial court’s habeas corpus order “results in one of the enumerated situations within Art. 44.01(a), the State may appeal regardless of what label is used to denominate the proceeding which results in the order being entered.”).

V. Even if the trial court’s order “discharging” Appellee actually dismissed the information, it would still be an appealable order under Article 44.01(a)(1)

By its plain text, Article 44.01(a)(1) unambiguously permits the State to appeal an order in a criminal case which “dismisses an indictment, information, or complaint[,], or any portion of an indictment, information, or complaint[.]” TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(1); *see Alvarez*, 977 S.W.2d at 593 (reiterating that the State may appeal an order which has the effect “of the enumerated situations within Art. 44.01(a),...regardless of what label is used to denominate the proceeding which results in the order being entered.”); *see also Chen*, 615 S.W.3d at 379 n.1 (explaining that the State could appeal an order granting Article 11.09 habeas corpus relief which dismissed an information, per

Article 44.01(a)(1)). In fact, this Court has specifically found that “[T]he intent of the Legislature in enacting [Article 44.01(a)(1)] was to allow for a state appeal from any order terminating the criminal proceedings against a defendant.” *Alvarez*, 977 S.W.2d at 593 (quoting *Young*, 810 S.W.2d at 224). Consequently, even if this Court agrees with the Fourteenth Court of Appeals that the trial court’s order granting Appellee’s request for Article 11.09 habeas corpus relief and discharging Appellee constituted a dismissal of the information—or otherwise terminated the criminal proceedings against Appellee, regardless of the trial court’s terminology—the State was nonetheless entitled to appeal that order pursuant to Article 44.01(a)(1). TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(1) (authorizing the State to appeal an order which dismisses a charging instrument or any portion thereof); *see Alvarez*, 977 S.W.2d at 593 (holding that the State was entitled to appeal a habeas corpus order which dismissed municipal court complaints because the order terminated the criminal proceedings against the defendant and, thus, triggered Article 44.01(a)(1)); *see also Chen*, 615 S.W.3d at 379 n.1. The Fourteenth Court of Appeals erred in ruling to the contrary.

◆

CONCLUSION AND PRAYER

For the foregoing reasons, the State respectfully submits that the Fourteenth Court of Appeals misconstrued Article 44.01 of the Texas Code of Criminal

Procedure and erred in concluding that the State does not have the right to appeal the trial court's order granting relief in Appellee's habeas corpus proceeding brought under Article 11.09 of the Texas Code of Criminal Procedure, when, regardless of the terminology used in the order, the trial court's order functionally served to either grant a new trial or to dismiss the information—both of which create an appealable scenario under Article 44.01(a). Accordingly, the State prays that this Court will: find that the State does have the right to appeal the trial court's order granting Article 11.09 habeas corpus relief; hold that the Fourteenth Court of Appeals does have jurisdiction over the State's appeal in this case; reverse the rulings of the Fourteenth Court of Appeals to the contrary; and remand this case to the Fourteenth Court of Appeals to consider the merits of the State's two points of error presented to that court.

Respectfully submitted,

KIM OGG
District Attorney
Harris County, Texas

/s/ Melissa Hervey Stryker

MELISSA HERVEY STRYKER
Assistant District Attorney
Harris County, Texas

500 Jefferson Street, Suite 600
Houston, Texas 77002
Telephone (713) 274-5826

Fax Number (832) 927-0180
Stryker_Melissa@dao.hctx.net
State Bar Number: 24053741

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4(i) and 70.3, the undersigned attorney certifies that there are 4,715 words in the foregoing computer-generated document, based upon the representation provided by Microsoft Word, the word processing program that was used to create the document, and excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Melissa Hervey Stryker

MELISSA HERVEY STRYKER

Assistant District Attorney
Harris County, Texas

500 Jefferson Street, Suite 600
Houston, Texas 77002

Telephone (713) 274-5826

Fax Number (832) 927-0180

Stryker_Melissa@dao.hctx.net

State Bar Number: 24053741

CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel has directed the e-filing system eFile.TXCourts.gov to serve a true and correct copy of the foregoing document upon Elaine Veatch Morley, attorney of record on appeal for Leonardo Fabio Garcia, Appellee, and upon Stacey M. Soule, the State Prosecuting Attorney, on May 20, 2021, at the following e-mail addresses, through the electronic service system provided by eFile.TXCourts.gov:

Elaine Veatch Morley
Counsel for Appellee,
Leonardo Fabio Garcia

2245 Texas Drive, Suite 300
Sugarland, Texas 77479
elainemorleylaw@gmail.com

Stacey M. Soule
State Prosecuting Attorney

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov

/s/ Melissa Hervey Stryker

MELISSA HERVEY STRYKER
Assistant District Attorney
Harris County, Texas

500 Jefferson Street, Suite 600
Houston, Texas 77002
Telephone (713) 274-5826
Fax Number (832) 927-0180
Stryker_Melissa@dao.hctx.net
State Bar Number: 24053741

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Melissa Stryker
Bar No. 24053741
stryker_melissa@dao.hctx.net
Envelope ID: 53648366
Status as of 5/20/2021 3:09 PM CST

Associated Case Party: LeonardoFabioGarcia

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---------------------|-----------|---------------------------|----------------------|--------|
| Elaine VeatchMorley | | elainemorleylaw@gmail.com | 5/20/2021 1:58:34 PM | SENT |

Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|----------------|-----------|---------------------------|----------------------|--------|
| Stacey M.Soule | | information@spa.texas.gov | 5/20/2021 1:58:34 PM | SENT |